trustee's duties, the only safe means of changing an insecure investment left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority, the trustee will be liable to the *cestui que trust* for breach of trust.

III. Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator and loss ensues, he will generally be protected, if acting with *bona fides*, even in cases where if there had been a power of sale and he had neglected to sell, he would have been liable under Rule I., laid down above.

IV. Where a bank or other corporation permits a trustee holding certificates of its stock, transferable only by one of its officers, and on which the name of the legal owner appears as trustee for another, to part with that stock, and no remedy can be enforced against the trustee, the corporation is held to have constructive notice of the contents of the instrument creating the trust, and if the trustee has exceeded his powers or in any way committed a breach of trust with the involuntary aid of the corporation, the latter will be held liable to the same extent as the trustee.

V. Executors and administrators have *virtute officii* a power to sell the estate of the decedent, and unless they have become trustees by the length of time which has elapsed since the conclusion of all of the duties of the office of executor, a corporation permitting a transfer at their instance would not, without notice and if acting with *bona fides*, be held liable therefor. A. S. B.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

UNITED SOCIETY OF SHAKERS *v.* UNDERWOOD ET AL.
WM. DAVENPORT *v.* SAME.

Bank directors will be held responsible to the depositors for the loss or conversion by the bank of special deposits in such bank, whenever they know of such conversion, or might have known of it by the exercise of such care and diligence as the law requires of such officers in representing the affairs of the bank.

Bank directors must be considered as affected with the knowledge of such facts as appear upon the bank books.

THE first case was an appeal from the judgment of the Franklin Circuit Court, and the latter from that of the Warren Court

of Common Pleas, but as the questions involved were almost identical, they were for convenience considered and determined together. The facts appear in the opinion of the court, which was delivered by

LINDSAY, J.—To each of the petitions a general demurrer was sustained, and the parties failing to plead further, judgments were rendered dismissing them absolutely, and we are now called upon to determine whether said petition set out facts constituting causes of action.

From them it appears that in the year 1865, the Bank of Bowling Green went into operation under a charter approved June 2d 1865, and that during the time it continued in business the defendants were members of its board of directors; and further, that before the institution of these actions said bank, upon the petition of the defendants, or some of them, had been declared a bankrupt by proper legal proceedings and was insolvent.

The Society of Shakers allege that on the 22d of February 1869, its agent, U. E. Johns, deposited with the bank on special deposit $72,450 in bonds, fully described in a memorandum incorporated into the petition, and that the bank had failed upon demand to return $55,660.40 of said bonds, also that it had failed to account for $9702.63, collected on interest-coupons attached thereto.

Davenport alleges that on the 3d of March 1866, he placed in the bank on special deposit nine Warren county bonds of $1000 each, which, by reason of the premium for which they would sell in the market, were of the value of $11,500, and that the bank had failed upon demand to return all or any of such bonds.

The Society of Shakers charge the conversion of its bonds in the following language: "Plaintiffs state that all the aforementioned bonds, aggregating in value the sum of $55,660.40, were wrongfully taken from plaintiffs' package of special deposit by the officers of the Bank of Bowling Green, and by them converted to the use and emolument of said bank by sale as aforesaid, without right or authority from these plaintiffs, or any of them, and of such wrongful conversion and appropriation defendants, and each of them, had or could have had, by the most ordinary diligence and investigation, ample notice."

Davenport alleges that his bonds had been "wrongfully appropriated by said Bank of Bowling Green and converted to the use and emolument of said bank, forwarded to its regular correspondents,

and by them sold and the proceeds of sale credited to the Bank of Bowling Green, and paid on checks or drafts of said bank, of all of which defendants, and each of them, had notice as well from the ledgers, books and accounts of said bank, as from its correspondence, reconcilements and statements." And further, "that said bonds were wrongfully appropriated as aforesaid to the use and benefit of said bank, and without authority from this plaintiff, and that of such wrongful conversion and appropriation, defendants and each of them, had, or could have had, by the most ordinary diligence, ample notice." It is also substantially charged in each petition that the defendants, acting as directors, "did, on various occasions, declare dividends when the condition of the bank did not justify the same, and so appropriated to themselves, they being the largest stockholders, large sums of money actually realized from the conversion of the plaintiff's property as aforesaid."

Upon the facts as thus stated, this court must determine whether or not appellees, or any of them, are personally bound to make good the losses resulting to appellants from the unauthorized and wrongful conversion by the bank of their special deposits.

In the adjudication of these causes, it is not necessary that we shall critically inquire into the duties and obligations resting upon bank directors to look after and protect the interest of special depositors, from whom the corporation represented by the directory received no compensation.

It is sufficient to say, that special deposits are mere naked bailments, and that neither the bank nor its directory undertake to exercise any greater care in their preservation than the depositor has the reasonable right to suppose is exercised in keeping the bank's property of like description.

It cannot be doubted, however, that if the deposit is lost by reason of the gross negligence, or the wilful inattention, of the directors, the bank is responsible therefor, upon the well established doctrine that a mere depositary is liable for gross negligence; and as the directory is the corporate government of the bank, and in the legal sense is the corporation itself, the negligence or inattention of its members can and ought to be imputed to the bank.

But the liability of the bank in these actions does not depend alone upon the averment of want of care and fidelity upon the part of the directors.

It is specifically charged that the deposits were sold by its offi-

cers and the proceeds thereof converted to its use and emolument with the knowledge of the directors.

The facts thus alleged imply the conversion by the bailee of the bailor's goods, for which, at the common law, an action of trover would lie.

The question here presenting itself for our decision is, whether the directors, who had knowledge of these alleged wrongful sales, can be held to answer personally for the deposits so converted.

Appellees insist that they cannot be so held, because of the want of privity between the depositors and themselves. They concede that for gross negligence or mismanagement upon their part, resulting in loss to the bank, they may be held to account to it, but urge that in so much as their undertaking was to the corporation, they can be proceeded against by it alone, and that these appellants must look to the bank and not to them.

This position is plausible, but it cannot in our opinion be maintained. Bank directors are not mere agents, like cashiers, tellers and clerks; they are trustees for the stockholders, and as to those dealing with the bank. They not only act for it and in its name, but in a qualified sense are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it: Morse on Banking 76, 77. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation, he has the right to expect reasonable diligence and good faith at their hands, and if they fail in either they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation. *Hodges* v. *New England Screw Company*, 1 Rhode Island 312. An honest administration of the affairs of the bank, and slight diligence at least in preventing special deposits from being wrongfully converted to its use, were legal duties which these directors were under obligations to the special depositors to perform, and as these obligations grew out of their implied contract that they would perform such duties, there is a legal privity between the parties. This doctrine was recognised by this court in the case of the *Lexington and Ohio Railroad Company* v. *Bridges*, 7 B. Monroe 556, in which case it was

held that the directors of that corporation, by accepting their positions, assumed the discharge of certain duties not only to the company, but to persons dealing with it, and that if they misappropriated the funds intrusted to their control and a creditor was damaged by the act, he had a right of action against them for the injury resulting from their illegal conduct. Whenever there exists a legal duty to perform or omit to do an act, the law will imply a promise by the person upon whom the duty rests, that he will discharge it, and between him and all persons having the legal right to demand its performance a privity of contract exists: Chitty on Contracts 1; Parsons on Contracts.

The right to recover in these actions does not rest alone upon the contract of bailment with the bank, and the implied contract resulting therefrom that the directors would not, by gross negligence or tacit acquiescence, permit the deposits to be converted by the bank. The petitions disclose a state of facts constituting an unlawful conversion of personal property by the bailor, and also such conduct upon the part of appellees, as makes them parties to the tort committed by their principal. It is immaterial whether or not an action of trover will lie against the directors, as well as against the bank. If they have been guilty of a breach of duty amounting to a tort, they may be held to account, although they cannot be sued jointly with the bank, in an action in the nature of trover and conversion. Treating the bank as the bailee, and these appellees as its mere agents, it is clear that if they directed the sale of the deposits, or knowingly permitted them to be sold, they thereby became participants in the wrong.

"To maintain trover the defendant must have converted the property to his own use, or have done some other act with a wrongful intent, expressed or implied." Hilliard on Torts, vol. 2, ch. 16, sect. 8, p. 284.

If one person disposes of the goods of another for the benefit of a third person, this is a conversion: Bacon's Abr., tit. *Trover*, sub. B.

"Every unlawful intermeddling with the goods of another is a conversion, it being a disposition *pro tanto* of the goods of another, as if they were the goods of the intermeddler:" Bac. Abr.; also, *Young* v. *Moore*, 7 J. J. Marshall 647.

In the well-considered case of *Pool* v. *Atkison et al.*, 1 Dana 110, it was held that the agent who disposed of the slaves of another in

obedience to the instructions of his employer, acting in good faith, and ignorant of the complainant's rights, was nevertheless liable to the true owner, and in the learned dissenting opinion it was not argued that his liability would have been an open question, had he acted in the matter with knowledge of the fact that the slaves were, at the time, the property of the party suing instead of his employer.

These appellants allege that their bonds were sold by the officers of the bank, and the proceeds paid out in the satisfaction of claims against it, and in the payment of dividends to the stockholders, and that of all this appellees had notice.

Having notice, it was their duty, and they had full power in the premises, to prevent the sales. Failing in this, their subsequent action in directing the proceeds, or some portion thereof, to be paid out in the shape of dividends to the stockholders, including themselves, was a ratification of the conversion which they had theretofore wrongfully permitted.

Considering their alleged wilful failure to discharge a plain duty, their ratification of the unauthorized sale and the appropriation to themselves of portions of the proceeds arising therefrom, there seems to be no valid reason, even under the rules of pleading at the common law, why they might not be held liable with the bank in an action of trover and conversion, but if there be well-founded doubt as to this conclusion, an action on the case would undoubtedly lie, to compel them to make good a loss resulting from a palpable failure upon their part to discharge a plain legal duty, the performance of which the complainants had the right to demand at their hands, and the non-performance of which was the direct and immediate cause of the loss.

It follows, therefore, that each of the two petitions under consideration sets out facts constituting causes of action, and this being the case under our rules of civil procedure, the general demurrer should have been overruled.

In said petitions we have stated the facts on which the legal obligations of appellees arose, the nature of the obligation, the breach of it, and the damages resulting from that breach. The petitions are good according to the strictest rules of common law pleadings. Chitty on Pleadings 136.

It is further objected that the allegation of notice is so far qualified as to render insufficient the averment of its existence. It is stated that appellees "and each of them, had or could have had,

by the use of the most ordinary diligence and investigation, ample notice." It is also alleged by Davenport that they each "had notice as well from the ledgers, books and accounts of said bank as from its correspondence, reconcilements and statements." It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties, they must, in controversies with persons transacting business with the bank, be presumed to have. They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements and statements of the bank, and which would have come to their knowledge except for their gross neglect or inattention.

It is not necessary in many cases to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or to the misconduct of the subordinate officers. It is sufficient to show that the evidences of the mismanagement, or misconduct, were such that it must have been brought to their knowledge, unless they were grossly negligent or wilfully careless in the discharge of their duties. If it shall turn out upon the trial of these actions that the ledgers, books, &c., of the bank showed the special deposits of these appellees were being sold, and that this fact would have been discovered by appellees by the use of ordinary diligence, then the presumption of actual knowledge will arise. It follows, therefore, that the allegation of notice is sufficient.

It is further insisted in the case of the United Society of Shakers, that it is manifest that all the defendants are not liable and that by reason of the misjoinder of parties defendant, the general demurrer was properly sustained.

An examination of section 120 of the Civil Code of Practice, will show that the improper joinder of parties defendant is not a ground for general demurrer, and under the 144th section of the New York Code, which is similar to section 120 of our own, the courts of that state have so held: *The People* v. *Mayor of New York*, 28 Barb. 240. The objection may be made available either by a rule requiring the appellant to elect which of the defendants it will proceed against, or by proper instruction by the court when the case goes to the jury. The case of *Hawkins* v. *Phythian*, 8 B. Monroe 515, does not authorize the deduction that because

there is a different and higher degree of diligence required of the president than of the other directors of the bank, they cannot be jointly sued in these actions.

In the case cited the declaration did not show that the injury complained of resulted from the joint act of the defendants, as is alleged in these cases. The judgments sustaining the general demurrers and dismissing the two petitions must be reversed.

The two causes are remanded, with instructions to overrule the general demurrers, and for further proceedings in each case conformable to the principles of this opinion.

We have examined the foregoing with some care, and feel some reluctance to dissent from any of its conclusions, since its general purpose is so much in the interest of good order and faithful administration in all the departments of business, and especially of official trust. But it seems to us, that even so desirable an end as this, may be attained by too great sacrifice or disregard of established legal principles.

The general proposition stated in the first head-note may be regarded as unexceptionable in terms, but we shall see hereafter that its application to this case is more questionable. And when the case is fully examined, it will appear that this first proposition rests wholly, so far as this case goes, upon the second proposition in the head-notes, and that this latter is not entirely tenable, when judged of fairly, by the established customs and course of business in such institutions. The opinion in one place assumes, that the case shows an assent on the part of the directors to the conversion, which would make the case most unquestionable for the appellants. For there can be no doubt, that any one having the legal control, as directors of a bank have over the conduct of the subordinate officers and servants in the employ of the bank, will render himself personally responsible for any tort committed by such subordinate officers and servants, while acting under the advice or consent of such directors. All principle and authority confirm this. But it seems to us the case stated in the opinion will not bear this construction.

The case being tried on demurrer will rest upon the legal force of the averments in the complaint. And these, as stated in the opinion, are only, that the appellees, "and each of them had, or could have had, by the use of the most ordinary diligence and investigation, ample notice." As this is an averment in the pleadings of the appellants, it must receive the least favorable construction towards them. In that view it imports, not that the appellees had notice, but that they might have obtained notice by proper investigation. And by looking into the averment in one of the cases, we find what this notice consisted in; "had notice, as well from the ledger, books and accounts of said bank, as from its correspondence, reconcilements and statements." This imports on the proper construction towards the pleader, that if the appellees had examined all these sources of information they would have discovered, that the bank, by their tellers and cashier, had put these bonds to their own use. But this only implies a notice after the fact of conversion, since the avails would only appear upon the books, probably, when converted into money. But that is not important here.

But upon the most favorable construc-

tion for the appellants, these averments can imply nothing more than that the appellees were deficient in the exercise of the proper degree of care and diligence in the matter. But if any principle in the law of business corporations is entirely well settled, it is that the creditors of such corporations have no right of action against the officers for mere omission of duty—mere nonfeasance. Such defaults are only breaches of obligation towards the corporation in which its creditors have no actionable interest. In the case of special deposits in a bank, the corporation is the depositary and not the officer receiving the same: *Foster* v. *Essex Bank*, 17 Mass. 479. There is thus no privity by way of contract, or duty, created between the depositary and any of the officers of the bank. It is competent for banks to receive the special deposits of their customers, but they are not obliged to do so whenever requested: *Thatcher* v. *State Bank*, 5 Sandf. Ch. 121. The bank in the case of special deposits are only gratuitous bailees, owing the lowest degree of care. Such deposits are not usually entered upon the books, or certified to the depositor, but there are probably different practices in regard to this. The directors of a bank would not ordinarily know much in regard to such deposits, and could scarcely be expected to keep any lookout in regard to them. The president might know more than the ordinary directors, but even he could scarcely be considered as owing any special duty, and if he did, it would be to the bank and not the depositor. The cashier and tellers would naturally have the entire charge of such deposits, and their duty to the bank would extend only to seeing that they were not needlessly exposed to loss or damage, and no duty from such officers would be due the depositor.

But, as said in *Foster* v. *Essex Bank*, *supra*, it would be a breach of trust for the bank or any of its officers to open a package left on special deposit, and whoever did or counselled such act would be responsible to the owner for such tort. And if done by an officer of the bank for its use and benefit, there can be no doubt the bank would be responsible, and we think the bank would now be held responsible, in such case, whether the avails went to its own use or not. The contrary was held in *Foster* v. *Essex Bank*, but the old idea that corporations were not responsible for the wilful act of their servants, is now nearly abandoned, and the more sensible rule adopted, that corporations are responsible for all acts of their servants within the range of their employment.

We have reviewed the cases upon this question in 1 Railways, § 130, pp. 532–542. One of the latest English cases on the point is *Burns* v. *Poulson*, L. R. 8 C. P. 563. See also *Ward* v. *London Omnibus Co.* 27 L. T. N. S. 761. In the late case of *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244, it was held that a bank is responsible for the willfully wrong act of its servant committed in the course of his employment. But it is not important to discuss this point here. The books all show, that such officers and servants are liable to the owner of such special deposits, for their own wilful acts, but not for mere negligence in the discharge of their duty to the bank, although the depositor may suffer an incidental loss thereby: *Bowlin* v. *Nye*, 10 Cash 416; Angell & Ames on Corp. §§ 241 *et seq.*; Story on Agency, chap. XII. §§ 308 *et seq.*; Mr. Justice STORY thus states the rule: "He [the agent] is not in general (for there are exceptions), [referring to cases of maritime contracts], liable to third persons for his own nonfeasances, or omissions of duty in the course of his employment. *His liability in these latter cases is solely to his principal.* The early cases of *McManus* v. *Crickett*, 1 East 106;

Ellis v. *Turner*, 8 T. R. 531; *Foster* v. *Essex Bank*, *supra*, and *Mechanics' Bank* v. *The Bank of Columbia*, 5 Wheat. 326, and some others, wherein it has been held that the master is not responsible for any wilful act of his servant, since that is, *ipso facto*, a departure from the employment, may be said to have a kind of half-dying existence still. But the introduction of railways has compelled the courts to hold corporations responsible for all acts of their servants, however wilful, provided they come fairly within the range of the employment, and are professedly done on behalf of such corporations. And negligence is not inferrible from the loss merely; the burden of proof of negligence rests on the plaintiff: *Smith* v. *Bank*, 99 Mass. 605.

But here the persons performing the wrongful acts complained of were, in no sense, the servants of the appellees. They were the servants of the bank, as much as any servants employed under the supervision of a superintendent are the servants of the common master. It would present a novelty in jurisprudence to hold the general superintendent of works personally responsible for the acts of his subordinates to those dealing with the owner, upon the ground that he did not restrain such subordinates from dereliction of duty. But that, in principle, is this case. And we cannot suppose, if the bank were still solvent, any one would dream of maintaining this action. And most of the bad law is made in this same way, by attempting to hold some one responsible, not originally in privity with the plaintiff. Upon the merits of the case, *Gibbin* v. *McMullen*, L. R. 2 Priv. Council 317, seems a full authority for the defendants, even if the action were against the bank.

It is fair to say, that some of the testimony declared upon in this case, for it seems to be rather a declaration upon the testimony than upon its legal results, would no doubt be regarded as competent to be given to the jury, as tending to prove the appellees cognisant of, and consenting to the conversion. But the declaration is not placed upon that ground, but rather upon the ground that the appellees are to be held responsible for not more carefully inspecting the affairs of the bank. In this view we have, we suppose, sufficiently shown the suit cannot be maintained.

We appreciate, of course, the high sense of justice implied in holding, not only the bank, but even the directors responsible for all the wrongful acts of the subordinate officers and servants of the bank. But if this is to be done by a kind of blind instinct of justice, regardless of established legal principles, it will, in the end, destroy all sense of security in public functionaries, and thus drive honest men out of such places. There might be a kind of moral justice in holding the bank, and even its directors, responsible for all wrongful acts of its servants performed within the bank-building, even by robbery or theft, but no one will vindicate such a course. And the same is equally true of all claim by special depositors against the directors, on the ground of negligence merely. I. F. R.

Supreme Court of the United States.

BARTEMEYER *v.* THE STATE OF IOWA.

The usual and ordinary legislation of the states regulating or prohibiting the sale of intoxicating liquors raises no question under the Constitution of the United States prior to the fourteenth amendment of that instrument.

The right to sell intoxicating liquors is not one of the privileges and immuni-